IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CIVIL APPLICATION NO. 855 OF 2004
IN
APPEAL FROM ORDER NO. 610 OF 2004.

Office Notes,Office Memoranda of Coram, appearances,Court's orders or directions and Registrar's orders.	:	Court's or Judge's orders.

H.A.Solkar for the appellants.

R.V.Govilkar for the respondents.

CORAM: V.C. DAGA, J.

DATE : 19th August 2004.

P.C.:

. In view of disposal of the appeal, this civil application does not survive. The same is dismissed as infructuous with no order as to costs.

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CIVIL APPLICATION NO. 855 OF 2004
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Office Notes,Office Memoranda of Coram, appearances,Court's orders or directions	:	Court's or Judge's orders.

and Registrar's orders. :

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

APPEAL FROM ORDER NO. 635 OF 2003.

Todkar Group. ... Appellant.

V/s.

1. Bhapkar Petrol Depot,

2. Smt.Mrinalini Laxman Gadve,

3. Shri Morappa alias Yuvaraj
Laxman Gadve,

4. Municipal Corporation of
the City of Pune,

5. The Municipal Commissioner
Municipal Corporation of
the City of Pune,

6. The City Engineer,
Building Control Department,
Municipal Corporation of
the City of Pune,

7. Bharat Petroleum Corporation
Ltd.

8. The Veer Shaiv Co-op.
Bank Ltd. ... Respondents.

P.K.Dhakephalkar for the appellant.

N.V.Walawalkar with S.A.Sawant and H.V.Kode
for respondent No.1.

Amol Mhatre for respondent Nos.2 and 3.

R.G.Ketkar for respondent No.4 to 6.

S.G.Page for respondent Nos.7.

Jaydeep S. Deo for respondent No.8.

CORAM: V.C. DAGA, J.

DATE : 19th August 2004.

P.C.:

Rule, returnable forthwith.

Appeal is heard by consent of parties and is being disposed of finally. Perused appeal and the documents produced.

This appeal is directed against the order dated 1st July, 2003 passed by the 5th Joint Civil Judge, Senior Division, Pune below Exh.12 in Special Civil Suit No.923 of 2002, whereby the trial Court partly allowed application (Exh.12) and directed defendant Nos.1 t 3 to remove the stair case having opening in the suit property with further direction to remove the material for construction kept in the suit property.

The facts giving rise to the present appeal, in nutshell, are that M/s.Bhapkar Petrol Depot, a partnership firm filed suit for

declaration and injunction in respect of the property described in para 1(b) of the plaint ("suit property" for short). In the said suit, the declaration sought is that defendant No.1/ appellant herein does not have any right, title and interest in respect of suit property. Plaintiff has also prayed for interim relief.

In the aforesaid suit, the suit property by measurement is described as admeasuring 800 sq.mtrs. In the said suit, application for injunction marked as Exh.12 came to be moved to seek mandatory direction to remove the stair case. Trial Court after hearing the parties to the suit was pleased to direct removal of the stair case holding that it open in the suit property of the plaintiff. This order is a subject matter of challenge in the present appeal.

On 6th October, 2003, when this matter was placed before learned single Judge of this Court (Kanade, J.) the matter was heard and from the order sheet it appears that on suggestion being made by this Court learned counsel for the appellant agreed t remove stair case within one

week and, accordingly, the stair case has been removed. By the same order, learned single Judge was pleased to direct D.I.L.R./T.I.L.R. to carry out measurement of the disputed properties after giving notice to the plaintiff and defendant Nos.4 and 7 and to submit his report to this Court within four weeks. Accordingly, the report along with map has been placed on record of this appeal.

If one turns to the map produced on record by the City Survey Officer, the land admeasuring 569 sq.mtrs has been shown in possession of the plaintiff who is running a petrol pump. It is not in dispute that the land claimed to be in possession of the plaintiff is admeasuring about 800 sq.mtrs. It is also in dispute that the land admeasuring 392 sq.mtrs. came to be acquired for the purpose of road widening. If this portion acquired is subtracted from the holding of the plaintiff i.e. 800 sq.mtrs., then plaintiff will only have land of 408 sq.mtrs. or thereabout but in no case 569 sq.mtrs. Therefore, prima facie it appears that the land in possession of the plaintiff is much more than what it should have been in its possession. In this view of the

matter, it would be first necessary for the plaintiff to get the suit property demarcated, may be with the assistance of the Court. At the same time, it would also be open for the appellant/ defendant No.1 to get its plot demarcated and to find out how the area in possession of the plaintiff is increased. After measurement and demarcation, if it is established that the plaintiff is in possession of the area larger than the area which should have been in its possession and that they found to have encroached upon some of the land from the property of the others then, in that event, the trial Court will have to consider as to whether the stair case which was constructed by the appellant/ defendant No.1 was in the encroached area or in the area which the plaintiff is legally entitled to possess. If the stair case, which was constructed, was found not falling within the area of the plaintiff then, in that event, the existence of the stair case would not have been objected by the plaintiff and there could not have been any order directing removal of the said stair

case by mandatory interim order. However, as the things developed as on date the staircase is not in existence. The plot of land possessed by the plaintiff needs to be demarcated together with the property of defendant No.1 and only after demarcation it can be decided as to whether the stair case was falling in the area of the plaintiff or otherwise. Without getting the properties demarcated, the trial Court should not have passed mandatory order which is required to be passed in rarest of rear case.

It is made clear that after demarcation of the plots, if the stair case which was erected as per the sanctioned plan was found to be not on the plot of land possessed by the plaintiff then, it that event, it would be open for appellant/ defendant No.1 to construct the stair case.

Mr.Ketkar, learned counsel for the Pune Municipal Corporation states that in that event the Corporation will have no objection and fresh permission will not be necessary. It would be open

for the plaintiff to apply for measurement of his own plot along with plot of defendant No.1. It would be open for the trial Court to consider the prayer in its proper perspective in the light of the observations made herein. However till such time, parties to the suit shall maintain status-quo.

In this view of the fact, the impugned order is quashed and set aside. Application (Exh.12) is restored t file. It would be open for defendant No.1 to move proper application and to take appropriate steps in the light of the observations made herein. Appeal, accordingly, stands disposed of in terms of this order with no order as to costs.

All the concerned to act on ordinary copy of this order duly authenticated by the Associate/ Personal Secretary of this Court.

Issuance of certified copy is expedited.

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CIVIL APPLICATION NO.1267 OF 2003
WITH
APPEAL FROM ORDER NO. 635 OF 2003.

Office Notes,Office Memoranda of Coram, appearances,Court's orders or directions and Registrar's orders.	:	Court's or Judge's orders.

P.K.Dhakephalkar for the appellant.

N.V.Walawalkar with S.A.Sawant and H.V.Kode for respondent No.1.

Amol Mhatre for respondent Nos.2 and 3.

R.G.Ketkar for respondent No.4 to 6.

S.G.Page for respondent Nos.7.

Jaydeep S. Deo for respondent No.8.

CORAM: V.C. DAGA, J.

DATE : 19th August 2004.

P.C.:

. In view of disposal of the appeal, this civil application does not survive. The same is dismissed as infructuous with no order as to costs.

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FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

APPEAL FROM ORDER NO. 673 OF 2004.

Office Notes,Office Memoranda of Coram, appearances,Court's orders or directions	:	Court's or Judge's orders.

and Registrar's orders. :

A.M.Seraogee with Vipin Mishra
for the appellant.

U.J.Makhija i/b. Mulla & Mulla C.B.C.
for B.P.T.

J.Xavier for B.M.C.

CORAM: V.C. DAGA, J.

DATE : 19th August 2004.

P.C.:

. On the motion made by learned counsel for the appellant, appellant is allowed to withdraw this appeal, subject to payment of cost of Rs.5,000/-. Trial Court is directed to recover the amount of costs from the appellant. Failure on the part of the appellant to pay costs, trial Court shall be free to dismiss the suit for non-compliance of the order.

. Accordingly, appeal dismissed as withdrawn.

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FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CIVIL APPLICATION NO. 907 OF 2004
WITH
CIVIL APPLICATION NO. 964 OF 2004
IN
APPEAL FROM ORDER NO. 673 OF 2004.

Office Notes, Office Memoranda of Coram, appearances,Court's orders or directions and Registrar's orders.	:	Court's or Judge's orders.

A.M.Saraogi with Vipin Mishra

for the appellant.

U.J.Makhija i/b. Mulla & Mulla C.B.C.
for B.P.T.

J.Xavier for B.M.C.

CORAM: V.C. DAGA, J.

DATE : 19th August 2004.

P.C.:

. In view of dismissal of the appeal, both these civil applications do not survive. The same are dismissed as infructuous with no order as to costs.

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FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

APPEAL FROM ORDER NO. 719 OF 2004.

Office Notes,Office Memoranda of Coram, appearances,Court's orders or directions and Registrar's orders.	:	Court's or Judge's orders.

Virag Tulzapurkar i/b. Little & Co.
for the appellant.

V.A.Thorat with A.C.Singh i/b.
Dhanesh Shah for respondent No.1.

J.Xavier for respondent No.3.

CORAM: V.C. DAGA, J.

DATE : 19th August 2004.

P.C.:

. Heard.

. Admit.

. Mr.Singh i/b. Dh
Shah waives service for respondent No.1.

. Mr.Xavier waives service for respondent No.3.

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FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CIVIL APPLICATION NO. 968 OF 2004
IN
APPEAL FROM ORDER NO. 719 OF 2004.

Office Notes,Office Memoranda of Coram, appearances,Court's orders or directions and Registrar's orders.	:	Court's or Judge's orders.

Virag Tulzapurkar i/b. Little & Co.
for the appellant.

V.A.Thorat with A.C.Singh i/b.
Dhanesh Shah for respondent No.1.

J.Xavier for respondent No.3.

CORAM: V.C. DAGA, J.

DATE : 19th August 2004.

P.C.:

. Rule, returnable after two weeks.

. Ad-interim stay so far as para-1 of the operative part of the impugned order dated 12th May, 2004 is concerned.

. Mr.Singh i/b. Dhanesh Shah waives service for respondent No.1.

. Mr.Xavier waives service for respondent No.3.

. Both the respondents are directed to file their counter affidavits within two weeks from today.

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